

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

DEC 28 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA, |) | 2 CA-CR 2011-0289-PR |
| |) | DEPARTMENT B |
| Respondent, |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| v. |) | Not for Publication |
| |) | Rule 111, Rules of |
| TIMOTHY JOSEPH RILEY, |) | the Supreme Court |
| |) | |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000303

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

Law Office of Emily Danies
By Emily Danies

Tucson
Attorneys for Petitioner

K E L L Y, Judge.

¶1 Petitioner Timothy Riley entered into a plea agreement that covered charges in CR200700445, CR201000303, and CR201000335. In this cause, CR201000303, he was convicted of fleeing from a law enforcement vehicle and sentenced to a stipulated 2.5-year prison term, which was to be served concurrently with a 1.5-year term for failure to appear in CR201000335. Riley sought post-conviction

relief in this cause, claiming trial counsel had been ineffective in failing to provide the court with information at the time of sentencing that would have warranted additional presentence incarceration credit. The trial court denied relief and denied Riley's motion for reconsideration. This petition for review followed. Absent a clear abuse of discretion by the trial court in deciding whether post-conviction relief is warranted, we will not disturb its ruling. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 At the time of the sentencing hearing, Riley's counsel suggested Riley might be entitled to more presentence incarceration credit than the 113 days the probation department had recommended in the presentence report. Counsel explained Riley had been in federal custody on another matter and that Riley believed state authorities had placed a detainer on him in connection with the precursor of the instant cause, a justice court prosecution, and that Riley had asserted his speedy trial rights as well. The court made clear it had looked through the record before it and had information relating only to CR200700445, which had been dismissed as part of the plea agreement. Addressing the trial court himself, Riley asserted that before counsel was appointed, he had asserted his speedy trial rights in the justice court causes, including the cause now numbered as 201000303, but conceded he had failed to provide the county attorney's office with copies of the motions he had filed asserting those rights. The court gave counsel an additional thirty-one days to provide it with documentation that would support the contention that Riley was entitled to more than the 113 days' credit recommended in the presentence report.

¶3 Riley subsequently filed a motion to correct the sentence, attaching various supporting documents, and explaining the history of the justice court proceeding as it related to this cause and the basis for his claim that he was entitled to additional pre-sentence incarceration credit. Relying on an attached copy of an Order To Issue Writ and Writ of Habeas Corpus Ad Prosequendum, filed in CR200700445, the dismissed cause, Riley maintained he had been released from federal prison on January 22, 2010, and taken into state custody the following day. At that time, a warrant also was outstanding in CR200700667, the justice court prosecution that was re-filed as this cause, CR201000303. Riley requested 126 days' credit for the period between his release from federal custody on January 22, 2010, and his sentencing on May 28, 2010. The court granted the motion in July 2010, increasing presentence incarceration credit by eight days, from 118 to 126.

¶4 In his petition for post-conviction relief, Riley claimed trial counsel had been ineffective because he had not “procure[d]” and presented to the trial court documents that would have established he was entitled to credit for the period between October 6, 2009, when he had requested the appointment of counsel and “sent speedy trial motions to the Justice of the Peace Court,” and sentencing on May 28, 2010, substantially more credit than he had received when the court granted his motion to correct his sentence. He argued that when it became apparent to counsel he was unable to “procure” the information he needed, he should have asked for more time than the thirty-one days the court had given him. The information he referred to and which he ultimately obtained from the justice court included correspondence between Riley and the

justice court, as well as a motion to quash warrant, outstanding charges and/or indictments in CR200700667. Riley asserted he was entitled to additional presentence incarceration credit for “the appropriate days of presentence credit for which he is entitled.”

¶5 Denying the petition, the trial court assumed, “without deciding,” that some of the documents attached to the Rule 32 petition would have increased the amount of credit to Riley for time served before sentencing. Still the court denied relief, finding counsel’s failure to “seek or obtain” additional time to procure the items that Rule 32 counsel attached to the petition did not constitute deficient performance based on prevailing professional norms. The court found that Riley had failed to establish counsel had been unprofessional because there was nothing “to indicate whether previous counsel had any reason to believe that the letters and other materials really existed and [would be] forthcoming within any particular time.” The court added that there was nothing before it establishing Riley had been prejudiced, even if counsel had performed deficiently in this regard. The court concluded, “Because the court does not know when the documents were actually received, the court cannot know that if defendant had filed a motion of extension of time, . . . the court would have given a sufficient extension of time to allow the documents to be presented.”

¶6 On review, Riley contends the court erred by failing to address the merits of the claim and decide whether the materials presented with the petition did, indeed, demonstrate he was entitled to additional presentence incarceration credit. But a defendant is not entitled to relief based on the ineffective assistance of counsel unless the

defendant is able to establish both elements of the test articulated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984): deficient performance based on prevailing professional norms and resulting prejudice. *See also State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (failure to meet both elements of *Strickland* test fatal to claim of ineffective assistance of counsel).

¶7 The trial court is correct that nothing Riley presented establishes when he or his counsel received the information from justice court. Rule 32 counsel has avowed she did not receive the documents from Riley until February 17, 2011, when she began investigating and preparing the petition, which she filed in June 2011. But the record before us includes Riley’s May 28, 2010 letter to justice court in which he explained that he had just appeared for sentencing in superior court and that the court had given his counsel additional time to obtain more documentation that would be helpful to his sentence. Riley asked the justice court for the various materials he had sent to that court in 2009 regarding CR200700667 and requested that the court send them to his attorney at the Public Defender’s office in Bisbee “as soon as possible,” noting his counsel had also requested a copy of the file. That letter was stamped as received by justice court on June 1, 2010. But, the record before us does not establish whether, and if so when, Riley or his trial counsel received the information pursuant to that request. In any event, Riley has not established how counsel was remiss in obtaining the information.

¶8 It is not entirely clear what the trial court meant when it said in its order denying post-conviction relief, “Further, there is no information from which this court could conclude that defendant suffered any prejudice by reason of trial counsel’s alleged

failure,” after it had initially stated, “The court will, for present purposes, assume (without deciding) that some of the materials attached to the PCR petition might have increased the credit granted to Mr. Riley.” The court seemed to be saying that because Riley had not established when the documents actually had been received, the court could not decide whether it would have granted counsel additional time within which to present the materials. Although the court did not abuse its discretion in reaching that conclusion, the more germane question, given the nature of this claim, is whether, even assuming counsel had performed deficiently in not procuring the information and not asking for more time to obtain it, the outcome of the sentence was affected. We conclude Riley did not sustain his burden to show that it was, and therefore the court did not abuse its discretion in summarily dismissing the petition for post-conviction relief.

¶9 To demonstrate the requisite prejudice, a “defendant must show there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. First, Riley has not refuted the state’s assertion, in its response to the Rule 32 petition, that any delay in the pursuit of the instant charge was not the result of bad faith but was due to confusion about Riley’s location. According to the state, attempts were being made in September 2009 to pursue the charges in CR200700445 before Riley had even asserted his speedy trial rights in CR200700667, the justice court case that was renumbered as this cause. Additionally, at the sentencing hearing, Riley asserted he had sent the letters to the justice court asserting his speedy trial rights but admitted he had failed to provide copies to the

Cochise County prosecutor or prosecutor's office. Thus it is unclear when the state had notice of Riley's assertion of his speedy trial rights in CR200700667.

¶10 Nor has he cited any authority for the proposition that if the state unreasonably fails to move forward on charges after a defendant has asserted his speedy trial rights, he is entitled to additional credit for the period of his incarceration after the assertion of those rights. Here, that would have been the period between when he sent the October 2009 letters and sentencing on May 28, 2010. Although the Interstate Agreement on Detainers (IAD), A.R.S. §§ 31-481, 31-482 appears to have been implicated by Riley's assertion of his speedy trial rights while still in federal custody, *see* § 31-481 art. II(a) (for IAD, "state" includes United States), he has not cited persuasive authority for the proposition that a defendant is entitled to presentence incarceration credit following his assertion of his speedy trial rights.

¶11 The IAD requires that a person charged with a crime in Arizona and imprisoned in another state "be brought to trial [in Arizona] within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court . . . written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment." § 31-481 art. III(a). Riley seems to have asserted his speedy trial rights in this cause in October 2009. But, even assuming *arguendo* the IAD were at all implicated here, it requires the defendant to also notify the prosecuting officer, making clear that the defendant is requesting "a final disposition of the indictment, information or complaint," § 31-481 art. III(a). Here, Riley did not provide the Cochise County Attorney with copies of the letters he had sent to justice

court. Additionally, according to the state, there was no detainer in CR200700667, an assertion Riley does not refute; rather, as the state contends and the record shows, he was taken into custody by Cochise County law enforcement on January 23, 2010, pursuant to the writ of habeas corpus ad prosequendum issued in CR200700445, the case that was ultimately dismissed. Riley has not established how any purported delay in that cause warranted additional presentence incarceration credit in this cause; nor does it appear the state unreasonably delayed prosecution in this cause.

¶12 In any event, a defendant is entitled to presentence incarceration credit only for “time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense.” A.R.S. § 13-712(B); *see also State v. Bridgeforth*, 156 Ariz. 58, 59, 750 P.2d 1, 2 (App. 1986) (defendant entitled to presentence incarceration credit “only . . . for time actually spent in custody pursuant to the offense” not for time spent on unrelated matter), *aff'd as modified*, 156 Ariz. 60, 750 P.2d 3 (1988); *State v. San Miguel*, 132 Ariz. 57, 60-61, 643 P.2d 1027, 1030-31 (App. 1982) (same). Riley has not established any period of incarceration between October 2009 and January 23, 2010, the date he was taken into Cochise County custody in CR200700445, pursuant to the instant offense. As the October 15, 2009 letter from justice court to Riley states, there was apparently an outstanding warrant for his arrest in this cause and presumably for that reason the court granted his request for credit for the time between January 23 and May 28. But Riley has not established he was entitled to more credit than what he received simply because he filed a motion to quash the warrant and a letter

asserting speedy trial rights in October 2009.¹ Consequently, any deficient performance by counsel was not prejudicial in that Riley's sentence would not have been different had counsel provided the court with the documents attached to the Rule 32 petition.

¶13 We grant Riley's petition for review but for the reasons stated herein, we conclude Riley has not sustained his burden of establishing the trial court abused its discretion by denying his petition for post-conviction relief. Accordingly, we, too, deny relief.

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

¹Indeed, by giving Riley 126 days' credit, the trial court might have given Riley more presentence incarceration credit than he was entitled to, based on the record before us. As we stated previously, although there was an outstanding warrant in this cause, apparently no detainer had been issued in this case, only in CR200700445. The record suggests that the earliest date Riley was taken into custody pursuant to the instant offense was January 28, 2010, when he was in court for his initial appearance. Thus, it appears the court gave him, at a minimum, five days' incarceration credit to which he was not entitled, in light of the fact that he was being held pursuant to the detainer in CR200700445 between January 23 and January 28. After that date and until he was sentenced on May 28, 2010, Riley arguably was being held pursuant to both CR200700445 and CR200700667.